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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

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No. 787

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THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA,
*Petitioners,*

v.

THE UNITED STATES OF AMERICA,
*Respondent.*

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## PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION

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We do not rely on the failure of the Government to dispose of our land to third parties to establish the propriety of our claim that we still own the land, as the Government would have this Court believe (Opp. 3). Rather, we say there can be no "ratification" of an erroneous survey by the mere administration of land as part of the national forests where (a) the Government has no awareness of the error, and (b) the President's authorization to create national forests did not include the power to take any Indian land.

The Government states (Opp. 4) that it has appropriated monies for administration of the national forests over the years with "knowledge of their actual boundaries" and that this act constitutes "as the Court of Claims

held, confirmation and ratification of their boundaries." This is not true. The Government had no knowledge of the missurveys until 1965 when the errors were established by the Court of Claims, 173 Ct.Cl. 398. It is our position that since the Government lacked knowledge of the missurveys, the presence of which this Court found to be critical in *United States* v. *Creek Nation*, 295 U.S. 103 at 110, the decision of the Court of Claims in the instant case is not "consonant" with the decision of this Court in *Creek Nation*.

The Government argues (Opp. 4) that *United States* v. *Goltra*, 312 U.S. 203, is inapposite because this Court in that case found no prior authorization or subsequent ratification of the "taking." We rely on *Goltra* because we contend that contrary to the finding of the court below, there was in our case no prior authorization or subsequent ratification of the taking. In other words, our case and *Goltra* are identical in principle and should result in the same holding. A conflict is created by the antithetical result.

The Government has completely misinterpreted the decision of the Court of Claims in *Seminole Nation* v. *United States*, 102 Ct.Cl. 565, *cert. den*, 326 U.S. 719. The court did not hold that the disposals commencing in 1892 and continuing until 1913 constituted a "taking." The court held that the Government in 1892 began exercising ". . . ownership over and appropriating to its own use these lands . . . ." 102 Ct.Cl. at 618. The "taking" did not occur ". . . until the patents were issued and until [Congress failed] to direct their cancellation after it was *discovered* that they were issued on lands belonging to the Seminoles." 102 Ct.Cl. at 620 (emphasis added). Prior to discovering the erroneous survey, any adoption by Congress of the unauthorized appropriation "could not be a taking, because the intention to take was lacking." 102 Ct.Cl. at 620.

In our case the error in the surveys was not established until 1965, but the court below still found ratification notwithstanding the absence of the indispensable element of knowledge or inte . The court failed to recognize the "distinction," which it so carefully drew in *Seminole*, between (a) the mere treating of property as the Government's own, and (b) a "taking" calling for just compensation. We freely concede the Government treated our property as its own. However, because of the lack of knowledge of the error in the surveys, the facts in our case never rose to fulfill the requirements of a "taking." Therein lies the conflict between our case and the *Seminole* case.

Finally, the Government argues (Opp. 5) that this case is one of "limited application". This statement completely ignores the fact that this identical issue is pending in *Yakima Tribe* v. *United States*, Docket No. 47, Indian Claims Commission.

Respectfully submitted,

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